

No. 14,870

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHARD STANLEY and
MARION L. TAYLOR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

This Court has jurisdiction of this case under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant Richard Stanley was convicted in Criminal No. 33907 on one count of sale of 18 grains of heroin in violation of the Harrison Narcotic Act and one count of concealment of the heroin in violation of the Jones-Miller Act. In Criminal No. 33903 he was convicted on one count of sale of 37 grains of heroin

in violation of the Harrison Narcotic Act and one count of concealment of the heroin in violation of the Jones-Miller Act. Appellant Richard Stanley and appellant Marion L. Taylor were both convicted in Criminal No. 33902 with the sale of 1½ grains of cocaine in violation of the Harrison Narcotic Act. Appellant Taylor received a 5-year sentence and a fine of \$100. Appellant Stanley received 5-year sentences on all counts in the three indictments of which he was convicted plus a \$500 fine. The 5-year terms in Criminal Nos. 33903 and 33907 are to run concurrently, and the 5-year sentence in Criminal No. 33902 is to run consecutive to the terms of imprisonment on the other two indictments for a total sentence of ten years.

Appellant Taylor first applied for relief under Section 2255 of Title 28 United States Code on January 26, 1955. On that same date United States District Judge George B. Harris denied the motion. Application was made to this Court for permission to appeal in forma pauperis from this decision. A per curiam opinion of this Court denied permission to appeal in forma pauperis after the court below had certified that the appeal was not taken in good faith. *Taylor v. United States* (C.A. 9, 1955), 221 F.2d 228. Thereafter, appellant Taylor made a second motion to vacate under the provisions of Section 2255 of Title 28 United States Code. This motion consisted of a summary of petitioner's views of the evidence at the trial. Numerous contentions of error were made. On June 29, 1955 United States District Judge George

B. Harris denied appellant's motion to vacate. Appeal was then made to this Court.

On September 20, 1954 appellant Richard Stanley moved to vacate his sentence under Section 2255 of Title 28 United States Code. On September 22, 1954 United States District Judge George B. Harris denied appellant's motion. It does not appear that appeal was taken from this order. Thereafter, appellant Stanley made a second motion to vacate under Section 2255 of Title 28 United States Code. This motion was denied on July 6, 1955. Appeal was made to this Court from that order.

QUESTION PRESENTED.

Is the sentencing court required to entertain a second motion under Section 2255 of Title 28 United States Code?

ARGUMENT.

Both appellants, prior to the orders which form the subject of their appeal in this case, were denied relief under motions made pursuant to Section 2255 of Title 28 United States Code. Section 2255 provides that

“the sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.”

This Court has held that a court is without jurisdiction to entertain a successive motion for relief

under Section 2255 of Title 28 United States Code. *Winhoven v. Swope* (C.A. 9, 1952), 195 F.2d 181, 183. This principle was recently reaffirmed in another decision involving Winhoven. *Winhoven v. United States* (C.A. 9, 1955), 221 F.2d 793. In *United States v. Hayman* (1952), 342 U.S. 205, the court upheld the constitutionality of Section 2255. The court below was clearly not required and was without jurisdiction to grant the relief prayed for by appellants.

Both appellant Taylor and appellant Stanley are attempting to relitigate their cases before this Court. A jury passed upon appellants' contention. The court below held that the evidence was sufficient for their conviction. Appellants may not constitute this Court as a new jury to retry their cases. Motions under Section 2255 are in the nature of a collateral attack of the judgment. No contention is made in either petition justifying collateral impeachment of the jury's verdict. The judgment of the District Court should be affirmed.

Dated, San Francisco, California,
November 9, 1955.

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